Rationales for Applying CERCLA Retroactively After *Landgraf v. USI Film Products*: Overcoming the Presumption Against Retroactivity

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Since its enactment in 1980, many courts have faced the issue of whether CERCLA should be applied retroactively to create liability for the creation of hazardous waste sites occurring long before CERCLA was passed. For several years, the courts routinely held that CERCLA's text, legislative history, and overall purpose warranted retroactive application. However, the Supreme Court's recent ruling in Landgraf v. USI Film Products, *requiring a clear expression of congressional intent to overcome the traditional presumption against retroactivity, has re-opened debate on CERCLA's retroactivity. At least one federal court has held, in light of* Landgraf, *that there is not sufficiently clear evidence of congressional intent to apply CERCLA retroactively. This Comment canvasses the history of CERCLA's retroactive application, outlining the basis for the many pre-*Landgraf *decisions applying CERCLA retroactively. The author then thoroughly analyzes* Landgraf. *The Comment concludes that CERCLA's text, legislative history, overall purpose, and congressional silence, taken together, support continued retroactive application even after* Landgraf.

I. INTRODUCTION

From 1964–1973, approximately 16.5 million gallons of concentrated chemical waste were deposited in an area well known for its sandy soil and abundant groundwater reserves in Hardeman County, Tennessee.[1] The Velsicol Chemical Company, the operator of the site, assured local public health authorities in 1964 that it had only placed "semi-solid non-combustible residue" in "corrosion-resistant 55-gallon drums" at the site.[2] However, the drums soon began leaking and contamination was evident in the wells of private citizens.[3] The company's actions did not violate state law in 1964, but nonetheless have since created significant harm to the present environment.[4]

In 1980, Congress addressed the problem of old or abandoned hazardous waste sites, like the Velsicol site, through the Comprehensive Environmental

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[1] *See* CRAIG E. COLTEN & PETER N. SKINNER, THE ROAD TO LOVE CANAL: MANAGING INDUSTRIAL WASTE BEFORE EPA 156–57 (1996).

[2] *See id.*

[3] *See id.*

[4] *See id.* There was ultimately a multimillion dollar judgment against Velsicol. *See* Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303 (W.D. Tenn. 1986).

Response, Compensation, and Liability Act (CERCLA).[5] CERCLA imposes liability on Potentially Responsible Persons (PRP's),[6] such as Velsicol Chemical, for damage caused by a release or threatened release of a hazardous substance into the environment.[7] When an action is brought under CERCLA's liability scheme, usually under CERCLA section 107, courts customarily apply the statute to impose strict, joint and several, and retroactive liability on PRP's.[8]

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[5] 42 U.S.C. § 9607(a). In general, CERCLA provides for funding and enforcement authority for cleaning up thousands of hazardous waste sites in the United States. *See* J. GORDON ARBUCKLE ET AL., ENVIRONMENTAL LAW HANDBOOK (11th ed. 1991). CERCLA also directs the Environmental Protection Agency (EPA) to list at least 400 sites on the National Priorities List for prioritized long-term remedial evaluation and response. *See* VALERIE M. FOGLEMAN, HAZARDOUS WASTE CLEANUP, LIABILITY, AND LITIGATION 36 (1992). CERCLA also created "Superfund," a multibillion dollar cleanup fund that the U.S. EPA is authorized to use to investigate, abate, and clean up hazards created by abandoned contaminated sites. *See id.* at 1.

[6] CERCLA section 107(a) provides liability for:

> (1) the owner and operator of a vessel or a facility,
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> (2) any person who at the time of disposal of any hazardous substance *owned or operated* any facility at which such hazardous substances were disposed of,
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> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or *arranged* with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . and
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> (4) any person who *accepts or accepted* any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened released which causes the incurrence of response costs . . . .

CERCLA § 107(a), 42 U.S.C § 9607(a) (1994) (emphasis added).

[7] PRP's can be held liable for various types of damages: (1) response costs incurred by EPA, (2) response costs incurred by private persons, (3) natural resource damages, (4) health assessment or health effects study costs. *See* AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION, CERCLA PRIMER 1 (Susan K. Wiens & Lisa S. Keyes eds., 1995).

[8] CERCLA's text does not expressly address whether liability is strict, joint and several, and retroactive, but courts have nonetheless held that it does apply strictly, joint and severally, and retroactively. *See* O'Neil v. Picillo, 883 F.2d 176, 182 n.9 (1st Cir. 1989) (finding that CERCLA liability is strict); Idaho v. Hanna Mining Co., 882 F.2d 392, 394 (9th Cir. 1989) (finding that CERCLA imposes strict liability), United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988) (finding that CERCLA retroactively imposes strict, joint and several liability); United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 810 F.2d 726, 734 (8th Cir. 1986) (finding that CERCLA operates retroactively in situations in which past acts have contributed to existing endangerment); Continental Title Co. v. Peoples Gas Light and Coke Co., 959 F. Supp. 893, 895 (N.D. Ill. 1997) (finding that *Olin* is not persuasive and that

Currently, there has been debate on the *retroactivity* of CERCLA[9]—whether a party whose conduct was completely legal prior to CERCLA's enactment in 1980, such as Velsicol Chemical's conduct in 1964, can now be civilly liable under CERCLA for damages.[10]

CERCLA does not speak directly to the issue of retroactive liability in its text. Moreover, because CERCLA was hastily passed by Congress in December 1980 during a lame duck session,[11] the scant legislative history provides little or no indication of congressional intent.[12] Thus, the courts have

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CERCLA applies retroactively); Gould Inc. v. A & M Battery & Tire Service, 933 F. Supp. 431 (M.D. Penn. 1996); Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 664 (N.D. Ind. 1996) ("[T]here is clear evidence that by enacting CERCLA Congress intended to hold parties responsible for the cleanup of releases that they caused or to which they contributed, even if the releases took place prior to the date CERCLA was enacted."); Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 695 (D. Nev. 1996) ("[T]he clear intent of Congress was to provide for retroactive application of the CERCLA liability provisions."); Hillsborough County v. A & e Road Oiling Service Inc., 877 F. Supp. 618, 621 (M.D. Fla. 1995) ("CERCLA's intent is to be both remedial and retroactive in nature."); Redwing Carriers, Inc. v. Saraland Apartments, Ltd., 875 F. Supp. 1545, 1552 (S.D. Ala. 1995) (holding that responsibility for cleaning up hazardous cites should be placed on "those responsible for problems caused by the disposal of the chemical poison" (quoting Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990)); Mayor of Town of Boonton v. Drew Chem. Corp., 621 F. Supp. 663, 669 (D.N.J. 1985) ("I have concluded that pre-CERCLA response costs are recoverable and that they may be recovered by the plaintiff herein . . . .").

[9] The issue of retroactivity had been settled for quite a while. However, with the recent ruling in *United States v. Olin Corp.*, 927 F. Supp. 1502 (S.D. Ala. 1996), the debate has again centered on whether CERCLA should truly be retroactive. For a more thorough discussion of *Olin*, see *infra* Part II.C. *See also* George Clemon Freeman Jr., *A Public Policy Essay: Superfund Retroactivity Revisited*, 50 BUS. LAW. 663, 664 (1995) (arguing for the repeal of retroactive application of CERCLA because of the decision in Landgraf v. U.S.I. Film Prods., 511 U.S. 244 (1994)).

[10] Liability imposed upon a party for conduct that was legal at the time is retroactive liability. A classic definition of retroactive application appears in *Ohio ex rel. Brown v. Georgeoff*, 662 F. Supp. 1300, 1303 (N.D. Ohio 1983) (citing Society for Propagating the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)), where Justice Story defined retroactive application as one which, "[c]reates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions of considerations already past . . . ." The Supreme Court has also addressed what is meant by retroactive liability. "[T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269–70 (1994). CERCLA does apply retroactively—it attaches new legal consequences to events completed before its enactment, and imposes a new duty with respect to transactions that happened in the past by holding parties liable for conduct that was entirely legal at the time.

[11] *See* FOGLEMAN, *supra* note 5, at 5.

[12] *See id.* at 21 n.4 (citing Artesian Water Co. v. Government of New Castle County,

been left to interpret CERCLA's language, and many have found the statute to apply retroactively. During the mid-1980s courts had determined that CERCLA did apply retroactively.[13] For more than a decade courts followed the rationale of decisions like *United States v. Shell Oil*[14] and *Ohio v. Georgeoff*,[15] which applied CERCLA retroactively. However, with the Supreme Court's 1994 ruling in *Landgraf v. USI Film Products*[16] the retroactive application of CERCLA has once again come into question.[17] In *Landgraf* the Court ruled that there is a presumption against retroactive application of a statute that can only be overcome by clear evidence of congressional intent.[18] Since *Landgraf*, some commentators and the district court decision in *United States v. Olin*[19] have suggested that there is not "clear congressional intent" to overcome the

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851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage.")); Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377, 1387 (E.D. Cal. 1991) (calling CERCLA an "extraordinarily poorly drafted statute"); *In re* Acushent River & New Bedford Harbor Proceedings, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989) ("Like many a court before it, this Court cannot forbear remarking on the difficulty of being left compassless on the trackless wastes of CERCLA. This Court has previously noted the statute's incomprehensible nature.").

There is no House, Senate or conference report on the bill that actually became CERCLA. In fact, during the House debates, Representatives identified over forty drafting errors on the bill which became CERCLA. *See* 126 CONG. REC. 31,969 (1980) (remarks of Rep. Broyhill); *id.* at 31,975 (remarks of Rep. Synder); *see also* Scarborough v. United States, 431 U.S. 563, 569–71 (1977) (discussing the problems associated with construing hastily drafted statutes).

[13] *See NEPACCO*, 810 F.2d at 732–33 ("[I]t is manifestly clear that Congress intended CERCLA to have retroactive effect."); United States v. Shell Oil Co., 605 F. Supp. 1064, 1079 (D. Colo. 1985) ("[T]he whole purpose and scheme of CERCLA is retrospective and remedial."); *Georgeoff*, 562 F. Supp. at 1313–14 (concluding "[t]hat the Congressional intent to make industry pay for the clean up costs must be interpreted as an intent to authorize lawsuits which impose liability retroactively upon transporters"). Even now in the 1990s most courts have resolved the fact that CERCLA applies retroactively. *See, e.g.*, *Nevada ex rel. Dep't of Transp.*, 925 F. Supp. at 700 ("This Court does not agree however that *Landgraf* undermines *NEPACCO*'s and *Shell Oil*'s textual analysis of CERCLA.").

[14] 605 F. Supp. 1064 (D. Colo. 1985).

[15] 562 F. Supp. 1300 (N.D. Ohio 1983).

[16] 511 U.S. 244 (1994).

[17] *See* John R. Jacus & Jan G. Laitos, *May CERCLA Apply Retroactively*, COLO. LAW., Oct. 25, 1996 at 103 (1996) (briefly discussing the questions that have now arisen because of *Landgraf*'s effect on CERCLA's liability scheme).

[18] *See* Landgraf v. USI Film Prods., 511 U.S. 244 (1994). For a complete discussion of *Landgraf*, see *infra* Part II.B.

[19] 921 F. Supp. 1502 (D. Ala. 1996), *overruled by* United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).

presumption against retroactivity[20], thus finding CERCLA cannot be applied retroactively.[21]

This Comment explores the evidence of congressional intent, reflected in CERCLA's text, legislative history, and policy objectives, to overcome the presumption against retroactive application of a statute mandated by *Landgraf*.[22] Part II focuses on the background of CERCLA's retroactivity, beginning with the first cases to hold CERCLA retroactive. It then explains the Supreme Court's decision in *Landgraf*, and closes with a discussion of the recently decided district court decision in the *Olin* case. Part III examines the reasons for retroactive application of CERCLA, explaining how the text, legislative history, the overall congressional purpose, and congressional silence all function as evidence of Congress's intent that CERCLA applies retroactively. Part IV shows why the presumption against retroactivity in *Landgraf* does not require CERCLA to be applied only prospectively.

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[20] "Yet Judge Hand's opinion on retroactivity, while standing in isolation, is legally well-reasoned and provides ample basis for the 11th Circuit to upset the Superfund applecart, if it is so inclined." Mark D. Tucker, *"Retroactive Liability" Is Challenged*, NAT'L L.J., Oct. 14, 1996, at C23; *see also Superfund: Current Owners Could Foot CERCLA Bill if Olin Decision Holds Up, Panelist Asserts*, Nat'l Env't Daily (BNA) at D-7 (Sept. 25, 1996) (discussing Panelist Bernstein's argument that the district court's decision in *Olin* is correct because "the legislative history is a mess" and "no congressional intent to provide for retroactive application could be found in that record."); *Justice Department, GOP Congressman Disagree on Impact of Superfund Ruling*, Nat'l Env't Daily (BNA) at D-6 (May 29, 1996) (discussing *Olin* controversy and citing George Baker, executive director of the business-based coalition, Superfund Reform '95, as stating that the court's ruling "is bound to be replicated in court cases across the country as innocent parties rightfully continue to challenge EPA's efforts to punish them for perfectly legal conduct"); George Clemon Freeman Jr., *A Pubic Policy Essay: Superfund Retroactivity Revisited*, 50 BUS. LAW. 663, 666 (1995) (arguing that *Landgraf*'s presumption against retroactivity applies to CERCLA, thus limiting CERCLA to only a prospective application).

[21] *See Olin*, 921 F. Supp. at 1502. For a complete discussion of *Olin*, see *infra* Part II.C.

[22] The scope of this Comment does not include constitutional challenges to retroactive application of CERCLA. For a discussion of the constitutional challenges to CERCLA see FOGLEMAN, *supra* note 5, at 240; *see also* ALLAN TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE § 2.1 (1992). This Comment will not discuss the retroactivity of pre-enactment costs—those costs incurred by the government for cleaning up a site before CERCLA was enacted. For a discussion on the retroactive application of response costs, see James A. Resila, *The Retroactive Application of CERCLA: Pre-Enactment Response Costs*, 1 FORDHAM ENVTL. L.J., 69, 71 (1989) (determining that because the legislative history is unclear, CERCLA should not be construed to apply to pre-enactment response costs).

II. SETTING THE STAGE FOR RETROACTIVE APPLICATION

A. *Foundational Decisions*

Three early decisions extensively analyze CERCLA's retroactive application: *Ohio ex rel. Brown v. Georgeoff*,[23] *United States v. Northeastern Pharmaceutical & Chemical Co.* (NEPACCO),[24] and *United States v. Shell Oil Co.*[25] All three courts held that CERCLA applies retroactively.[26] These cases provide the crux of the argument for retroactive application before *Landgraf*.

Georgeoff was the initial decision to analyze fully whether CERCLA applies retroactively. First, the *Georgeoff* court determined that for Ohio to successfully collect from transporters of hazardous material, CERCLA must be applied retroactively.[27] The court reasoned that because the transporter's conduct took place *wholly before* CERCLA was passed, any imposition of

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[23] 562 F. Supp. 1300 (N.D. Ohio 1983).

[24] 810 F.2d 726 (8th Cir. 1986).

[25] 605 F. Supp. 1064 (D. Colo. 1985).

[26] *See supra* note 13 and accompanying text.

[27] The State of Ohio argued that CERCLA does not have a retroactive effect. *See Georgeoff*, 562 F. Supp. at 1303 ("Ohio urges the Court to create an exception to this definition—one which would allow a statute to rely solely upon past acts without finding the statute to apply retroactively."). The court rejected this argument by comparing liability under the Resource Conservation and Recovery Act (RCRA), which is based upon continuing harm, and CERCLA, which bases liability upon acts and events which occurred solely in the past. It distinguished RCRA from CERCLA citing a RCRA decision:

> The *Diamond Shamrock* decision illustrates an important distinction which underlines the [c]ourt's analysis of this issue. Because *Diamond Shamrock* retained control of the dump after the date of the statute's passage, liability could be premised upon *continuing* to maintain the dump in an improper condition. The *Diamond Shamrock* Court did not impose liability for placing the waste at the dump *before* RCRA's enactment. It relied solely upon *Diamond Shamrock*'s failure to remove the waste *after* RCRA's enactment.

Id. at 1304 (emphasis added).

Some courts find that retroactive application of CERCLA is not required, and instead find that CERCLA can be applied to make PRP's liable, avoiding the entire question of retroactivity. *See* United States v. South Carolina Recycling and Disposal Co., 653 F. Supp. 984 (D.S.C. 1984). "Thus, it is this court's view that CERCLA is not retroactive as applied in this case. Such a construction avoids a constitutional question and is therefore preferred . . . . [E]ven if CERCLA were considered retroactive it would clearly satisfy the requirements of due process." *Id.* at 997. *See also supra* note 10 (explaining retroactive liability).

liability under CERCLA would require reading the statute retroactively.[28]

After determining that CERCLA does have retroactive effect, the *Georgeoff* court addressed whether there was congressional intent to overcome the presumption against retroactive application of statutes.[29] Turning first to the textual evidence, the court analyzed the use of past tense verbs such as "accepts or accepted" and "inactive sites."[30] In arguing for retroactive application, Ohio as plaintiff relied on the maxim of statutory construction that a statute is to be construed to give meaning and effect to each of its words.[31] Thus, it contended that "accepted" must be construed to apply to conduct occurring before its enactment, otherwise it would be of no effect and violate the maxim.[32] The court found that although "accepted" could be construed to apply exclusively to pre-enactment conduct, the statute does not require such an application.[33]

The *Georgeoff* court then addressed Ohio's second textual argument—that because Congress provided for *only prospective* liability for damages to natural resources in section 107(f), and did not limit the temporal reach of the general liability provision, section 107(a), the general liability provision can be applied both retroactively and prospectively.[34] In other words, because Congress was explicit in defining section 107(f) to be prospective and was silent in section 107(a), the court can draw a negative inference that Congress intended section 107(a) to be both prospective and retroactive.[35] From the text of the statute—

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[28] *See Georgeoff*, 562 F. Supp. at 1304.

[29] *See id.* at 1308–09. In determining whether there was clear congressional intent the court applied a step-by-step analysis, beginning with the text of the statute. "The [c]ourt's analysis must begin with the fundamental rule of law that the intent of a statute is to be sought first in the language in which it is framed. If that language is plain and unambiguous, then there is no need to enlist the rules of interpretation . . . ." *Id.* (quoting Windsor v. State Farm Ins. Co., 509 F. Supp. 342, 344 (D.D.C. 1981)).

[30] *See id.* at 1310; *see also supra* note 6 for text of CERCLA section 107(a), 42 U.S.C. 9607(a)(1994).

[31] *See Georgeoff*, 562 F. Supp. at 1309–10.

[32] *See id.*

[33] *See id.* Although the court was uncomfortable in construing "accepted" to apply only prospectively, it stated the possibility that "accepted" could be read in such a way as not to imply retroactivity: "[T]he act of accepting hazardous wastes will have always taken place before the occurrence of a release which causes the incurrence of response costs. Transporters who acted after enactment of CERCLA will be held liable as having 'accepted' hazardous wastes." *Id.*

[34] *See id.* at 1311. "[T]he § 9607(f) prohibition on recovery for injuries to natural resources occurring before CERCLA's enactment suggests, by implication, that a similar prohibition does not apply to other response costs." *Id.*

[35] *See id.* at 1309–11. The negative inference that retroactive application of one section of a statute, because other sections are expressly limited to apply prospectively, is specifically

the past tense verbs and the negative inference—the *Georgeoff* court found that these "provisions provide *some* evidence that Congress intended CERCLA to apply retroactively."[36]

Finding the text helpful, but not dispositive, the court turned to the legislative history.[37] The court indicated that remarks made during Senate debates were strong evidence of the congressional intent to impose liability upon those who were responsible for dumping in the past. One Senator noted "the need for an emergency Federal response to deal with abandoned waste sites and chemical spills is real, and it is immediate."[38] Another Senator remarked that "we have no time to lose . . . . I believe the clear consensus is that we must clean up abandoned hazardous dump sites as soon as possible . . . ."[39] Thus, the court concluded that together both CERCLA's text and sparse legislative history provided an adequate ground to apply the statute retroactively.[40]

Two years after *Georgeoff*, two other lower courts undertook the analysis of whether CERCLA applied retroactively. The district court in *Shell Oil* agreed with *Georgeoff*, holding that CERCLA applies retroactively.[41] As in *Georgeoff*, the court found that verb tenses were not in themselves dispositive and that the negative inference argument—that Congress "implicitly authorized retroactive application of sections 107(a)(4)(A) and (B) by affirmatively limiting retroactive application of the third category of liability, damages to natural resources, section 107(a)(4)(C)"—was an additional indication of congressional intent to apply CERCLA retroactively.[42]

The court then undertook a brief analysis of the legislative history. Shell's principal contention was that because the House bill, as introduced, authorized recovery for pre-enactment response costs, the fact that the bill was stricken

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what the presumption *against* retroactivity is meant to alleviate. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 259 (1994) (finding against petitioners' argument that "[b]ecause Congress provided specifically for prospectivity in two places . . . we should infer that it intended the opposite for the remainder of the statute."); *see also* United States v. Olin, 927 F. Supp. 1502, 1510 (S.D. Ala. 1996).

[36] *Georgeoff*, 562 F. Supp. at 1311 (emphasis added).

[37] *See id.* at 1311. "The [c]ourt, therefore, will consider these statutory terms as indicia, but not dispositive indicia, of a [c]ongressional intent to allow retroactive application of CERCLA." *Id.*

[38] 126 CONG. REC. 30,940 (1980) (remarks of Senator Tsongas).

[39] *Id.* at 30,945 (1980) (remarks of Senator Danforth).

[40] *See Georgeoff*, 562 F. Supp. at 1311–12.

[41] *See* United States v. Shell Oil Co., 605 F. Supp. 1064, 1077 (D. Colo. 1985).

[42] *See id.* at 1076; *see also supra* notes 30–36 and accompanying text.

weighed heavily against retroactive application of CERCLA.[43] The court correctly reasoned that the removal of the retroactivity provision in the previous bill was not a conscious effort of Congress to delete retroactivity from CERCLA. Instead, the removal occurred because the language of the House bill was entirely struck and replaced completely with Senate Bill 1480.[44] The court weighed the textual evidence, legislative history, and general purpose and scheme of CERCLA together, ultimately concluding that "the whole purpose and scheme of CERCLA is retrospective and remedial . . . [and] CERCLA authorizes recovery of pre-enactment response costs."[45]

In 1986, the Eighth Circuit became the first circuit court to face the question of whether CERCLA applies retroactively.[46] In its decision, the *NEPACCO* court, citing *Shell Oil*, found that CERCLA evidences a "clear congressional intent" to overcome the presumption against retroactivity. First, the court found the past tense of verbs—such as the encompassing nature of "owned or operated," "arranged," and "accepted"—were again not in themselves dispositive, but taken cumulatively provided evidence of retroactivity.[47] Second, it found the statutory scheme to be overwhelmingly remedial and retroactive, thus finding that for CERCLA to be effective it must reach past conduct.[48] Finally, the court confirmed this backward looking focus with the legislative history—the language of Senate Report 1480, and various other reports.[49] It ultimately found that CERCLA applied retroactively and held that pre-enactment response costs—costs incurred by the government to clean up the site before CERCLA was enacted—were recoverable from responsible

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[43] *See Shell Oil Co.*, 605 F. Supp. at 1077.

[44] *See id.* "I decline to draw from this deletion the conclusion Shell urges. Although the House did pass H.R. 7020, it did not become law. The version finally adopted by the House and enacted by Congress as a whole, amounted to a wholesale deletion of H.R. 7020 and substitution of S. 1480, the Senate Bill." *Id.*

[45] *Id.* at 1079.

[46] *See* United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 810 F.2d 726 (8th Cir. 1985).

[47] *See id.* at 733.

[48] *See id.* "Further, the statutory scheme itself is overwhelmingly remedial and retroactive. CERCLA authorizes the EPA to force responsible parties to clean up inactive or abandoned hazardous substance sites." *Id.*

[49] *See id.* at 733-37. "Congress intended CERCLA 'to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.'" *Id.* at 733 (quoting Environmental Responses Act of 1980, Pub. L. No. 96-510, 1980 U.S.C.C.A.N. (94 Stat. 2767) 6125).

parties.[50]

These foundation cases hold that imposing liability for past conduct, which was legal at the time, requires a retroactive reading of CERCLA, thus triggering the presumption against retroactivity. They all agreed that there is "clear congressional intent" evidenced in the text, legislative history, and the purpose and scheme of CERCLA, to find that Congress intended CERCLA to apply to pre-enactment conduct.

B. Landgraf's *Presumption Against Retroactivity*

The Supreme Court's opinion in *Landgraf*[51] is the Court's most recent directive on applying the presumption against retroactivity of statutes. In *Landgraf*, the Court decided that section 102 of the Civil Rights Act of 1991 should not be applied retroactively, finding "no clear evidence of congressional intent" that section 102 should apply to cases arising before its enactment.[52] The Court's first task was to "determine whether Congress ha[d] *expressly* prescribed the statute's proper reach . . . . [W]hether the new statute would have retroactive effect . . . ."[53] Because Congress did not expressly provide for the temporal reach of the statute, the Court turned to its second task—determining whether there was "clear congressional intent" to overcome the presumption against retroactivity.[54]

In trying to extract "clear congressional intent," the Court turned first to the text of the statute. However, the court found the text itself did not evidence a "clear Congressional intent."[55] In addition, the Court did not find negative inferences within the statute persuasive.[56] The petitioners, relying on the canon "*expressio unius est exclusio alterius*,"[57] had argued that "because Congress

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[50] *See id.* at 734–37.

[51] Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994).

[52] *See id.* at 286. The Court made a distinction between a "clear statement" of congressional intent and a "clear expression" of congressional intent. The latter is what the Court requires. *See id.* at 284, 286.

[53] *Id.* at 280 (emphasis added). The Court determined that a statute has a "retroactive effect" if it: "[I]mpair[s] the rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." *Id.*

[54] *See id.* It is notable that the Court did not prescribe that there must be a "clear statement" of congressional intent, only that there be "clear congressional intent" to apply the statute retroactively. The Court did not explicitly define what constitutes "intent." *See id.*

[55] *See id.* at 283.

[56] *See id.* at 259.

[57] The canon of statutory interpretation means "that the expression of one thing is the

provided specifically for prospectivity in two places, Section 109(c) and Section 402(b), [the Court] should infer that it intended the opposite for the remainder of the statute."[58] The Court rejected the argument. First, the Court reasoned that Congress knew how to provide for retroactivity if it wanted to, as it did apply Title VII's damages provision in the 1990 legislation to cases currently pending.[59] Next, the Court noted that these sections were "[c]omparatively minor and narrow provisions in a long and complex statute."[60] Thus, the Court concluded, "given the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect."[61]

The legislative history also lacked evidence of a congressional intent to apply the statute retroactively. First, there was a failed attempt to override a presidential veto of a similar bill that would have included retroactivity.[62] The Court found that the veto and failed override provided proof that Congress faced the retroactivity issue and deleted retroactive language as part of a compromise that made passage of the Act possible.[63] Furthermore, the legislative history indicated a lack of congressional will to apply the act

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exclusion of another." *See* BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

[58] *Landgraf*, 511 U.S. at 259.

[59] *See id.* at 259–61.

[60] *Id.* at 258.

[61] *Id.* at 259.

[62] *See id.* at 255–56. The veto incident arose under the following scenario:

> In 1990, a comprehensive civil rights bill passed both Houses of Congress. Although similar to the 1991 Act in many other respects, the 1990 bill differed in that it contained language expressly calling for retroactive application of many of its provisions, including the section providing for damages in cases of intentional employment discrimination. The President vetoed the 1990 legislation, however, citing the bill's "unfair retroactivity rules" as one reason for his disapproval. Congress narrowly failed to override the veto.

Id.

[63] *See id.* at 259.

> The absence of comparable language in the 1991 Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue. Rather, it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kind of explicit retroactivity command found in the 1990 bill.

Id. at 256.

retroactively, suggesting that Congress "agreed to disagree" about whether the act would apply to pre-enactment conduct.[64]

Section 102 also contained an authorization of punitive damages, a criminal type of sanction.[65] Because of the danger in imposing a criminal sanction retroactively, the Court found a possible constitutional ex post facto clause problem.[66] The Court stated that even if retroactive application of a new statute would vindicate its purpose more fully, it is not sufficient to rebut the presumption against retroactivity.[67] Through its extensive examination of both text and legislative history, the Court found an absence of a clear congressional intent to overcome the presumption against retroactivity. However, the Court not only considered the text and legislative history, but also took note of the "purpose" argument—"that retroactive application of a new statute [might] *vindicate its purpose more fully*."[68] However, in the context of the Civil Rights Act, the *Landgraf* Court found that the purpose argument was "not sufficient to rebut the presumption against retroactivity."[69] In the case of CERCLA, however, the purpose argument complements the legislative history and text to rebut the presumption against retroactivity. In light of the *Landgraf* decision, the stability of CERCLA's "well-settled" retroactive application becomes shaken.

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[64] *See id.* at 263. "The history reveals no evidence that Members believed that an agreement had been tacitly struck on the controversial retroactivity issue, and little to suggest that *Congress* understood or intended the interplay of §§ 402(a), 402(b), and 109(c) to have the decisive effect petitioner assigns them." *Id.* at 262–63.

[65] *See id.* at 281. As the Court correctly stated, punitive damages connote a type of criminal character and the imposition of punitive damages for conduct that was legal at the time, but is now illegal, creates a possible Ex Post Facto clause problem. *See* U.S. CONST. art. I, § 9, cl. 3 "The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions." *Landgraf*, 511 U.S. at 281.

[66] *See id.* at 281. Ex post facto laws are laws which provide a punishment for an act that was legal at the time it was committed. *See* BLACK'S LAW DICTIONARY 580 (6th ed. 1990). Constitutional challenges to the retroactivity of CERCLA are beyond the scope of this Comment.

[67] *See Landgraf*, 511 U.S. at 285–86. Notably, the Court also stated, "Section 102 is plainly not the sort of provision that *must* be understood to operate retroactively because a contrary reading would render it ineffective." *Id.* at 286.

[68] *Id.* at 285 (emphasis added).

[69] *Id.*

C. *United States v. Olin Corp.*[70]

In *Olin*, Judge Hand of the Southern District Court of Alabama broke with precedent, holding that CERCLA does not apply retroactively in light of the recent decision in *Landgraf*.[71] The court first set out its interpretation of the *Landgraf* test,[72] and like *Georgeoff*, *Shell Oil*, and *NEPACCO* found that CERCLA contains no language explicitly stating its temporal reach.[73]

The lower court then turned to CERCLA's legislative history. It mainly ignored the congressional debates and reports, curtly concluding that because of an absence of a clear indication of congressional intent in the legislative history, CERCLA does not apply retroactively.[74] The court took special note that there was no conference report and that much of the legislative history comes from "bills introduced which contributed to some extent to the final act."[75] The court read CERCLA's legislative history narrowly, reasoning that because the precise issue of retroactivity was not addressed in the debates, including debate on prior bills, any attempt to override the presumption against retroactivity in *Landgraf* was "nearly fatal."[76] When the court did not find a clear statement of

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[70] 927 F. Supp. 1502 (S.D. Ala. 1996), *overruled by* United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).

[71] *See id.* at 1502.

[72] *See id.* at 1511. The court set out the test as follows:

> 1) to determine a) whether Congress has expressly stated the statue's reach and b) if not, whether the text and legislative history have "clearly prescribed" Congress'[s] intent to apply the provision retroactively; 2) if not, to determine whether the provision actually has "retroactive effect on the party" . . . . 3) if so, to apply the traditional presumption against retroactivity—absent a clear congressional intent to the contrary.

Id.

[73] *See id.* at 1513. The court did not perform an independent textual analysis, but rather relied heavily upon the decisions in *Georgeoff*, *NEPACCO*, and *Shell Oil*.

> *Georgeoff*'s and *Shell Oil*'s conclusion that the statutory language in CERCLA is not sufficient to establish retroactivity is persuasive. Although *NEPACCO* arguably reaches a contrary conclusion, it does so without conducting nearly as extensive an analysis as done in *Georgeoff*. This court concludes, therefore, that the language of section 107 provides "no clear evidence of Congressional intent," as required by *Landgraf*.

Id. at 1513.

[74] *See id.* at 1515–16.

[75] *Id.* at 1514 (quoting FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.02[2][a], at 4A–51).

[76] *See id.*; *see also* Part III.B of this Comment for a comprehensive analysis of the

congressional intent to apply CERCLA retroactively, it concluded that there was simply a lack of evidence of congressional intent.[77] Because the court took such a narrow view of the history and the text, searching for some magically clear indication by Congress, it failed to see that the text, history, and general spirit of the act, taken together, provide clear evidence of a congressional intent to apply CERCLA retroactively. Finding that the presumption against retroactivity applies, but discovering no evidence of congressional intent to overcome the presumption, the court concluded section 107(a) and section 106(a) do not apply retroactively.[78]

The district court was later overturned by the United States court of Appeals for the Eleventh Circuit.[79] The court first noted the immense body of law which has found that CERCLA applies retroactively. It also noted that CERCLA was twice reauthorized, once with substantive changes, without suggesting that the courts had misconstrued the statute regarding retroactivity.[80] The court then undertook an independent analysis of CERCLA, beginning with the text. It noted that CERCLA was to reach "any person who *at the time of disposal* of any hazardous substance *owned or operated*" a facility.[81] Thus, the court reasoned that Congress wanted to target both current and former owners and operators of contaminated sites.[82]

The court went on to discuss the purpose and legislative history of CERCLA. It found that the purpose of CERCLA supports retroactive application, reasoning that "an essential purpose of CERCLA is to place the ultimate responsibility for the clean up of hazardous waste on 'those responsible for problems caused by the disposal of chemical poison,'"[83] the court found

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legislative history relating to the retroactivity of CERCLA.

[77] *See id.* at 1516.

[78] *See id.* at 1516–19.

[79] *See* United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).

[80] *See id.* (citing Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 and Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-49, 100 Stat. 1613).

[81] *See id.* at 1513.

[82] This argument is fairly weak. By including this language it could be argued that Congress sought to reach only "future former owners and operators," i.e., persons who would become former owners and operators after December 11, 1980, CERCLA's effective date.

[83] *Olin*, 107 F.3d at 1514 (quoting Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1501–02 (11th Cir. 1996) (internal citations omitted)). "Congress's twin goals of cleaning up pollution that occurred prior to December 11, 1980, and of assigning responsibility to culpable parties can be achieved only through retroactive application of CERCLA's response cost liability provisions; this fact provides additional evidence of clear congressional intent favoring retroactivity." *Id.*

that the purpose of CERCLA supports retroactive application. In assessing the legislative history, the court noted that while there was not an express statement regarding retroactivity, "all those commenting on [it and the parallel House bill] expressed the belief that the bills would apply retroactively to those responsible for the releases in existing waste sites."[84] Through an analysis of the statute's purpose, legislative history, and text, it concluded that there is clear congressional intent favoring retroactive application of CERCLA.[85]

Although Judge Hand's district court opinion was overruled by the Eleventh Circuit, his opinion raises important questions regarding the stability of CERCLA's retroactive scheme.[86] With no express mandate by Congress, the door is now open for courts and commentators to question CERCLA's retroactive application in light of the *Landgraf* decision.

III. OVERCOMING THE PRESUMPTION AGAINST RETROACTIVITY

A. *CERCLA's Text*

Any attempt to determine whether Congress specified a "clear congressional intent" to apply CERCLA retroactively must begin with the text of the statute itself.[87] The text of CERCLA is not in itself dispositive, yet it shows a uniform scheme to make polluters pay, even if the harm occurred in the past. The *Georgeoff* court recognized this through the use of verb tenses in CERCLA section 107(a),[88] which includes both present and past tense verbs.[89]

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[84] *Id.* at 1514 (quoting Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 662 (N.D. Ind. 1996). The court also declined to disregard any legislative history simply because Congress passed a compromise bill.

[85] *See id.* at 1515.

[86] Judge Hand's decision in *Olin* took a very narrow view of both what *Landgraf* requires as "clear congressional intent" and CERCLA's text and legislative history. "Evidence of clear congressional intent" should not be limited to a clear "statement" in the text and legislative history. In fact, "three justices objected to *Landgraf* because the majority adopted a 'clear intent' standard rather than a 'clear statement' requirement." *Olin*, 107 F.3d at 1513 n.16 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 287 (1994) (Scalia, J. concurring). Regardless, there are many indications both in the text and legislative history that provide clear evidence that Congress intended for CERCLA to apply retroactively. *See infra* Parts III.A and B.

[87] Note that *Landgraf* does not require that there be a clear "statement," only clear "evidence." *See Landgraf*, 511 U.S. at 286–87 (objecting to the majority's failure to announce a "clear statement rule" against statutory retroactivity, which could only be rebutted by an express command in the statutory text) (Scalia, J., concurring).

[88] *See* Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1310–11 (N.D. Ohio 1983).

That section reads: "any person who *accepts or accepted* any hazardous substances for transport" is liable as a PRP.[90] The court recognized that the word "accepted" may apply to pre-enactment conduct, but the statute does not require such application. However, the court noted that such a construction would render the word "accepts" virtually meaningless.[91] The *NEPACCO* court also recognized that phrases such as: "any person who . . . arranged with a transporter for transport for disposal"[92] and "any person who *at the time of disposal* of any hazardous substance *owned or operated* any facility . . . ."[93] evidenced the intent to impose liability on past actions that occurred before CERCLA was enacted.[94] Even though not dispositive in itself, this language at the very least raises a suggestion of liability for past conduct. The use of both verb tenses in the statute could be a mere drafting oversight, but it is more likely that Congress included both verb tenses deliberately because it anticipated that the majority of CERCLA suits would be for conduct that happened in the past.

A further textual argument made in both *Georgeoff* and *Shell Oil* employed the use of a negative inference. Both courts supported the view that because section 107(f) of CERCLA expressly states that damages to natural resources should only be applied prospectively, Congress implicitly authorized retroactive application of section 107(a) by affirmatively limiting only section 107(f) to prospective damages.[95] The Court in *Landgraf* specifically rejected this

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[89] *See id.* at 1310.

[90] CERCLA § 107(a), 42 U.S.C. § 9607(a)(4) (1994) (emphasis added).

[91] *See Georgeoff*, 562 F. Supp. at 1310. The court went on to explain that:

> At most, "accepts" will apply to transporters who accept hazardous substances for transport to facilities from which a release is presently occurring. While the [c]ourt is uncomfortable with this result, given the problems presented by the other proposed constructions of the words "accepts or accepted," the [c]ourt concludes that this is the most reasonable construction.

Id. at 1310 n.12.

[92] 42 U.S.C. § 9607(a)(3).

[93] 42 U.S.C. § 9607(a)(2) (emphasis added).

[94] *See* United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 810 F.2d 726, 733 (8th Cir. 1986).

[95] *See* United States v. Shell Oil Co., 605 F. Supp. 1064, 1075-76 (D. Colo. 1985). "I conclude that Congress implicitly authorized retroactive application of sections 107(a)(4)(A) and (B) by affirmatively limiting retroactive application of the third category of liability, damages to natural resources, section 107(a)(4)(C)." *Id.* at 1076; *see also Georgeoff*, 562 F. Supp. at 1311 ("Finally the § 9607(f) prohibition on recovery for injuries to natural resources occurring before CERCLA's enactment suggests, by implication, that a similar prohibition

argument, which is based on the *expressio unius est exlusio alterius* maxim. The Court found that because Congress specifically provided for prospectivity in two places, the Court should not automatically infer that it intended the opposite for the remainder of the statute.[96] The Court stated, "[g]iven the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect."[97]

Similarly, the natural resources provision in CERCLA, which is purely prospective, does not allow the inference of retroactivity in the remainder of the liability scheme. Although the negative inference argument is stronger in the case of CERCLA, it is not wholly persuasive in light of *Landgraf*. Unlike the two minor and remotely situated prospective provisions in the Civil Rights Act, section 107(f) of CERCLA is of greater consequence and closely related to the general liability provision of section 107(a). However, this negative implication is not conclusive proof of congressional intent. Therefore, the next step in the analysis is to examine congressional intent via legislative history.

B. *Legislative History*

In examining CERLCA's legislative history, it is important to review it within the overall context of its enactment. Congress was rushed to pass hazardous waste legislation before the end of the session.[98] There is no House, Senate, or conference report to explain the actions of the members of Congress who reached the compromise that eventually became CERCLA.[99]

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does not apply to other response costs.").

[96] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 259 (1994); United States v. Olin, 927 F. Supp. 1502, 1509 (S.D. Ala. 1996). *But see* Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 658 (N.D. Ind. 1996) ("[T]he distinction between natural resource damages and other response costs was implicit evidence that Congress intended liability for response costs to apply retroactively."); Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 694 (D. Nev. 1996) ("[T]he negative implication analysis . . . is far more persuasive in the CERCLA context than it was in the *Landgraf* case."); Nova Chemicals, Inc. v. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996) ("Although a similar negative inference argument was rejected in *Landgraf*, the facts of *Landgraf* are distinguishable.").

[97] *Landgraf*, 511 U.S. at 259; *See also supra* notes 56–61 and accompanying text.

[98] *See* Letter from Sen. Stafford and Sen. Randolph to Rep. Florio (Dec. 2, 1980), *reprinted in* 1 SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 at 774 (Comm. Print 1983) [hereinafter HISTORY].

[99] *See* FOGLEMAN, *supra* note 5, at 5. There were prior reports in the House and the

The two bills that originally proceeded through the House and Senate were H.R. 7020 and S. 1480, respectively. S. 1480 became the enacted version when Congress voted to strike the language of H.R. 7020 and replace it with S. 1480.[100] H.R. 7020 was originally introduced with a retroactivity provision, which was later deleted.[101] Under a cursory examination this would appear to support the argument that the provision does not apply retroactively because Congress explicitly took it out, meaning they wanted liability to be only prospective. However, in the context of CERCLA's enactment, and in light of the scheme of the Act, this deletion's effect is minimal because the final version passed by the House "amounted to a wholesale deletion of H.R. 7020 and substitution of S. 1480."[102]

The reports of the House and Senate on the early versions of the bill do not address the issue of retroactivity squarely, but House Report 1016[103] gives some guidance. First, the report mentions the infamous Love Canal.[104] This

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Senate, but no reports after the bill was revised behind closed doors in late December 1980. *See id.* at 5-30.

[100] *See Shell Oil Co.*, 605 F. Supp. at 1077.

[101] The deletion of the provision was not an explicit omission, rather it was a total rejection of the House bill, with the Senate substituting its bill for the House bill. *See* HISTORY, *supra* note 98, at 771. "Because S. 1480 contained revenue provisions, and therefore, had to originate in the House, the Senate struck all language after H.R. 7020's enacting clause and substituted S. 1480." FOGLEMAN, *supra* note 5, at 12. Therefore, many important provisions in the House bill were deleted, including particularly important oil spill provisions. *See id.* The deletion is also trivial because some believed the Senate bill imposed broader and much more encompassing liability (including retroactive liability) than the House bill, proving that even if the retroactive provision in the House was deleted, it was replaced by an even more broad liability scheme in S. 1480: "The chemical industry supports H.R. 7020 as it was reported by the House . . . . We oppose S. 1480 which is a legislative disaster. *It's too broad.* It tries to punish the chemical industry. It sets up a revolutionary federal toxic tort liability scheme for *past actions* which were perfectly legal at the time . . . ." HISTORY, *supra* note 98, at 237 (testimony on behalf of the Chemical Manufacturers Association given by Dr. Louis Fernandez, Vice Chairman of Monsanto Co., before the Finance Committee on Sept. 11, 1980) (emphasis added). Thus, the elimination of the retroactive provision in the House bill is meaningless.

[102] *Shell Oil Co.*, 605 F. Supp. at 1077. The *Shell Oil* opinion also discusses an additional section which was included in the Senate bill but later deleted, section 4(n), which limited recovery for pre-enactment damages recoverable under section 4(a)(2). However, section 4(n)(1) did not apply to section 4(a)(1), which provided for response costs. Thus, given the limited scope of section 4(n), the effect of its deletion is minimal. *See id.* at 1077-78.

[103] H.R. REP. NO. 96-1016, pt.1, *reprinted in* 1980 U.S.C.C.A.N. 6119.

[104] *See id.* at 6121. Love Canal refers to a site in New York which typified corporate irresponsibility. Hooker Chemical, the owner of the site, dumped chemical materials into the canal. In the 1950s Hooker faced a critical decision—residential developments were

site typified the problems associated with chemical sites that were sold or abandoned by companies.[105] In speaking of the Love Canal problem—sites which were created before hazardous waste legislation was passed—Congress expressed its concern as to who will bear the clean up costs associated with such pre-1980 sites, thus inferring a retroactive application of CERCLA.[106] The report also explains that those responsible for the releases should be liable for clean up costs.[107] It definitively states that CERCLA was enacted "to establish prohibitions and requirements concerning *inactive* hazardous waste sites, [and] to *provide for liability of persons responsible* for releases of hazardous waste at such sites."[108] The House Report provides additional insight on Congress's purpose of enacting CERCLA—to clean up hazardous sites.

The Senate Report also provides indicia of congressional intent. The report contains a letter from EPA Administrator Costle to Senator Randolph, definitively stating that CERCLA makes the polluter pay for past wrongs that are presently affecting public health and the environment.[109] The report also

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encroaching and chemical odors required attention. *See* COLTEN & SKINNER, *supra* note 1, at 157. Hooker eventually donated the property to the local school board, distancing itself from the long term management of the hazardous wastes. *See id.* at 158.

> Once filled and transferred, wastes from the Love Canal continued to haunt the neighbors. Exposure incidents persisted, at least one explosion occurred, and people complained about chemicals percolating into basement sumps. Eventually, during a period of elevated precipitation during the late [1970s], the problems with the site took on proportions that forced the state's health commissioner to issue an emergency health order that recommended evacuating homes in the area and made the site world-famous.
>
> *The great irony of the Love Canal situation, the virtual birthplace of the Superfund legislation and public mistrust of hazardous waste disposal sites*, was Hooker Electrochemical's objective in donating the property . . . [as] a means of avoiding liability . . . .

Id. at 160–61 (emphasis added).

[105] Although not specifically mentioned in this report, many other sites were similar to Love Canal in that they were created long before any hazardous waste legislation was passed. The problems of all such sites taken together provided the impetus to pass legislation that would clean up the past evils and make those who were responsible pay. *See id.* at 161. Other sites included: a Syracuse, New York site where Allied Chemical and Dye Company and its predecessors dumped sludge since the 1800s; a Sauget, Illinois site where Monsanto Chemical Company and others illegally received hazardous wastes and buried them, which resulted in open pooling of toxic wastes in the floodplain. *See id.*

[106] *See* H.R. REP. NO. 96-1016, pt. 1, at 18–21, *reprinted in* 1980 U.S.C.C.A.N. 6121–22.

[107] *See id.*

[108] *Id.* (emphasis added).

[109] *See* S. REP. NO. 96-848, at 97–103 (1980). The bill provides for response at abandoned and inactive sites. *See id.* at 97. The bill "establish[es] liability for costs expended

contains the views of Senators Domenici, Bentsen, and Baker: "S. 1480 . . . substantially chang[es] existing common law (in some cases retroactively)."[110] This report provides a stronger tendency to favor retroactivity, but taken by itself is not dispositive.

The floor debates are more telling of congressional intent in this case. In the House debates, numerous representatives indicated the need to clean up abandoned, inactive sites. Remarks included: "[the bill] is designed to clean up our environment from *past* improperly disposed of hazardous wastes";[111] "[t]hese are the problems of toxic waste that were disposed of *years ago*";[112] "[the bill deals] with the problem of *abandoned* waste sites";[113] and "this bill attempts to deal *with the problems of who pays for cleaning up* the environmental mess we have created."[114] Perhaps the most relevant exchange occurred between then-Congressman Gore and Congressman Stockman, where Congressman Stockman stated, "[And once EPA has] found that deep pocket, they will immediately go to court and sue that deep pocket, and then all the onus of the law, all the burden will be on him to prove that he was not responsible for an outcome that occurred thirty years later as a result of this retroactive liability."[115] Congressman Stockman's statement shows that even non-supporters of the House bill understood it to provide for retroactive liability.[116] The members of the House clearly recognized the importance of enacting legislation that made the polluters take responsibility. There was even an economic rationale given for imposing liability upon the past polluters:

> [B]y making pollution no-fault, by making it an industrywide problem to the extent that that moves us away from our effort to seek the guilty party, then we let the guilty party off the hook. I believe we need an effective bill to trace those assets to the grave, if necessary, to recover the funds. . . . But I ask who benefited from Hooker Chemical's pollution? Did industry benefit? No. Hooker Chemical benefited. In fact, to the extent that Hooker Chemical

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by the government to clean up past disposal practices that *today* are threatening public health and the environment." *Id.* at 98. The liability provisions are not retroactive because "they merely codify long-standing common law rules relating to liability for hazardous products and undertakings." *Id.*

[110] *Id.* at 119.

[111] 126 CONG. REC. 31,972 (1980) (statement of Rep. Vento) (emphasis added).

[112] *Id.* at 31,973 (statement of Rep. Fisher) (emphasis added).

[113] *Id.* at 31,980 (statement of Rep. LaFalce) (emphasis added).

[114] *Id.* at 31,981 (statement of Rep. Brown) (emphasis added).

[115] Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1312 n.16 (N.D. Ohio 1983) (quoting 126 CONG. REC. 26,786 (1980) (statement of Rep. Stockman)).

[116] Congressman Stockman had even offered an amendment to drastically limit the bill, but it failed. *See* FOGLEMAN, *supra* note 5, at 10.

> polluted and its competitors tried to be responsible, its competitors tried to be good citizens, they lost. . . . So I think it is important that we try to move toward a vehicle which imposes a cost on those who pollute. . . *because if Hooker Chemical pays* and *not the whole industry, then Hooker Chemical cannot pass the cost to the consumer*. . . .[117]

Members of the House understood the problems of imposing retroactive liability. There was clear congressional intent that CERCLA should apply to sites such as Love Canal, and that Hooker Chemical, the creator of Love Canal, should be the party responsible for cleaning up.[118]

Senators' concerns echoed those of the House: "Our present laws are not enough . . . .We must correct those omissions in the law having to do with *past* hazardous waste disposal methods."[119] "I believe the clear consensus is that we must *clean up abandoned hazardous dump sites* as soon as possible."[120] "Governments must have a tool *for holding liable those who are responsible* for these costs."[121] These debates illustrate that Congress intended for the polluter to pay, even if it meant imposing retroactive liability.[122] Congress was cognizant of the problems associated with the clean up of abandoned sites and realized that Superfund itself would not be sufficient. Hence, Congress intended that recovery from PRP's would be necessary to implement CERCLA. Without

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[117] HISTORY, *supra* note 98, at 323 (remarks of Rep. Gramm) (emphasis added). *But see* Bruce Howard, *Reforming Retroactive and Current Owner Liability Standards in CERCLA to Increase Fairness and Efficiency*, 9 J. NAT. RESOURCES & ENVTL. L. 325, 332 (1994) (arguing that retroactive application of CERCLA should be scrapped and replaced with a tax scheme on insurance companies, business, and the general public).

[118] *See supra* notes 104-117 and accompanying text.

[119] 125 CONG. REC. 17,995 (1979) (statement of Sen. Muskie introducing S. 1480) (emphasis added).

[120] 126 CONG. REC. 30,945 (1980) (statement of Sen. Danforth) (emphasis added).

[121] *Id.* at 30,971 (statement of Sen. Chaffee) (emphasis added).

[122] The views of other senators show that Congress was cognizant of the retroactivity problem. Senator Moynihan, for example, clearly expressed his views on retroactivity:

> However, there are problems with the EPA superfund concept. The draft legislation that they have come up with . . . just doesn't deal effectively with the difficult issues. First of all, it would have *no retroactive effect*, and so it wouldn't deal with the Love Canal problem. That, as far as I am concerned, is a sine qua non, a *nonnegotiable* item.

HISTORY, *supra* note 98, at 32 (emphasis added).

Congressman LaFalce also succinctly addressed the problem: "It is imperative, therefore, that the Federal legislation that we enact in the future take cognizance of what New York State has done . . . that there be some *retroactive effect* in the legislation . . . ." *Id.* at 31 (emphasis added).

imposition of liability on defendants, CERCLA would be rendered ineffective, because Superfund would eventually run dry.[123] The legislative history shows that Congress intended for CERCLA to make PRP's fully liable for conduct that happened in the past which may harm the health and the environment of the present.

C. *Policy and Purposes Behind CERCLA*

Finding that both the text and legislative history provide strong indicia of congressional intent, the next step in the analysis is to examine the overall legislative scheme and purpose of CERCLA.[124] The spirit of CERCLA is clearly to clean up abandoned and inactive hazardous waste sites, such as the Velsicol Chemical site in Tennessee or the Love Canal site in New York.[125] The question is whether clear congressional intent exists to prove that the means for accomplishing the cleanup lie with those who are responsible, both before 1980 and after. Four indicators confirm that the spirit of CERCLA is to make polluters responsible for past wrongs that have harmed today's present health and environment.

First, the scheme and text of the statute itself show that the spirit of CERCLA is to make polluters pay. The statute explicitly lists who the responsible persons are, and this, coupled with the clear congressional intent,

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[123] Superfund was only intended as a revolving fund (whereby the government can take funds from the Superfund to pay for initial clean up and then replenish the fund by later collecting from the responsible parties) rather than a complete account to clean up all orphaned or abandoned hazardous waste sites. *See* Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1313 (N.D. Ohio 1983). One commentator notes that "if retroactive liability is fully eliminated, this will leave an annual shortfall in revenues that has been estimated by the Congressional Budget Office to be as much as $1.6 billion." Tucker, *supra* note 19, at C26.

[124] In accordance with the "funnel of abstraction," the first inquiry involved the plain meaning or pure textual analysis, then the analysis turns to legislative intent via the legislative history. The legislative purpose analysis seeks to determine if the policy and purposes of the statute support retroactivity. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353-62 (1990). "The statutory text is central and commands deference. But to grasp the full reality of its impact we should see it as part of a flow of policy-making activity." *Id.* at 359 n.137 (quoting JAMES WILLIAM HURST, DEALING WITH STATUTES 41 (1982)).

[125] It was obvious that the EPA needed additional authority to address what was a growing problem of abandoned and uncontrolled hazardous waste sites. In 1979 and 1980, the passage of proposed legislation was spurred by publicity surrounding the release of hazardous substances from Love Canal and other uncontrolled or abandoned sites.

FOGLEMAN, *supra* note 5, at 7. *See also supra* notes 104-106 and accompanying text.

shows that the purpose of CERCLA is to clean up old sites. It makes sense that in listing certain categories of persons, Congress intended each of them to be held liable. The scheme of section 107(a), defining responsible parties, shows that Congress wanted each category of polluters to pay—transporters, past and present owners and operators, and arrangers. Such a scheme clearly contemplates that within this group of PRP's, someone must be held accountable, even if the conduct occurred in the past.

Second, the overall purpose and spirit of CERCLA is reflected throughout the legislative history. Although the legislative history was not unequivocal in providing for retroactivity, the purpose of CERCLA that can be gleaned from the legislative history is that of imposing costs upon those who contributed to the problem. The Senate Report states:

> [S]ociety should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefited from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created.[126]

Thus, although not crystal clear, the legislative history truly evidences CERCLA's spirit to hold those who contributed to the problem liable.

Third, it is clear that Congress knew and understood what was involved in terms of quantity of sites and funds by setting up Superfund only as a revolving fund for advancing the costs of cleaning up hazardous sites while litigation progressed, not as a means to pay for the entire clean up effort.[127] The *Georgeoff* court cited this apparent lack of sufficient funds in Superfund as an indicia for retroactive liability:

> [C]ongress was aware that the costs of the cleanup it envisioned would greatly exceed the amount of the Superfund. The legislative history of CERCLA is replete with references to the scope of the problem which Congress faced. [Congress] referred to dump sites requiring clean up numbering in the thousands....
>
> Obviously, the $1.6 billion Superfund itself will not provide sufficient funds for the clean up of the existing dump sites without some provision for lawsuits against private parties.... Assuming arguendo that the cost of the clean up could be held to $10 billion, 84% of that cost must be recovered from sources other than the Superfund to complete the job.[128]

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[126] S. REP. NO. 96-848, at 98 (1980).

[127] *See Georgeoff*, 562 F. Supp. at 1312–13.

[128] *Id.* at 1313.

The lack of sufficient funds to clean up the sites that Congress contemplated shows that one of the purposes of CERCLA was to provide for a recovery of funds where possible. Thus, Congress created section 107(a) to provide for clean up of hazardous sites, making those who were responsible for the past conduct liable for the harm to the health and environment of society today.

Finally, comparing CERCLA to the Resource Conservation and Recovery Act (RCRA)[129] provides additional evidence that the spirit of CERCLA is to provide for retroactive liability. There is clear congressional intent that RCRA was to be a forward looking statute. CERCLA was enacted after RCRA to fill the gaps RCRA left. CERCLA was to look in the opposite direction of RCRA—backwards. As Representative. Madigan put it:

> The Congress provided through the Resource Conservation and Recovery Act a regulatory mechanism to insure the proper disposal of hazardous waste and to end the negligent practices of the past.
>
> However as many of us . . . recognized early on, there was definitely a gap in existing law in dealing with abandoned or "orphan" dump sites.[130]

If CERCLA is not to apply retroactively to impose liability on PRP's, then for all practical purposes CERCLA is superfluous because RCRA covers most liability for prospective dumping. Then-Representative Gore's remarks show that RCRA was intended to take care of future problems with hazardous wastes, while CERCLA was to take care of past problems:

> There are two major aspects to the problem [of hazardous waste]: First the prospective dumping, that will occur in the future. Second, dumping that has already occurred in the past. . . [T]he prospective dumping will be addressed in a regulatory program to take effect later this fall pursuant to the mandate . . . of RCRA. What we are addressing [in] this legislation is the dumping that occurred in the past.[131]

CERCLA was enacted four years after RCRA, when Congress realized the deficiencies and shortcomings of the 1976 legislation.[132] The House Report on CERCLA discusses the problems of RCRA, including the fact that it applies only prospectively.[133] Even the Supreme Court acknowledged the differences

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[129] Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1994).

[130] 126 CONG. REC. 26,340 (1980) (statement of Rep. Madigan).

[131] HISTORY, *supra* note 98, at 239. "We are talking about the financial resources needed to take care of the problems of the past where some companies did a poor job or whose local jurisdictions had weak laws." *Id.* (remarks of Rep. Stockman on Sept. 23, 1980).

[132] *See* H.R. REP. NO. 96-1016, pt.1, at 22, *reprinted in* 1980 U.S.C.C.A.N. 6121.

[133] *See id.* The House report further discusses the problems of RCRA, and that it only

between RCRA and CERCLA: "Congress thus demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and that language used to define the remedies under RCRA does not provide that remedy."[134] The fact that CERCLA was enacted just two years after RCRA, containing section 7003, focusing on the abatement of conditions presently threatening public health and the environment, shows that Congress meant for CERCLA to be a mechanism, distinct from RCRA, to clean up past sites and recover from those who were responsible.[135] The hole RCRA left open was for CERCLA to fill, otherwise Congress could have just amended RCRA's provisions. The main thrust of CERCLA is to provide a backward looking mechanism to provide for cleanup of "abandoned" and "inactive" sites.[136] Thus, in light of the resonating purpose of CERCLA, there is abundant evidence of congressional intent to overcome the presumption against retroactivity.

D. *Congressional Silence*

Congress has had ample opportunity, more than a decade, to alter the retroactive application of CERCLA.[137] Over time many cases have been tried

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applies prospectively:

> (c) Deficiencies in RCRA have left important regulatory gaps.
>
> (1) The Act is prospective and applies to past sites only to the extent that they are posing an imminent hazard . . . .
>
> It is the intent of this committee in this legislation to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites.

Id.

[134] Meghrig v. KFC Western, Inc., 516 U.S. 479, 485 (1996).

[135] *See* United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 810 F.2d 726, 738 (8th Cir. 1986). "[RCRA] Section 7003 focuses on the abatement of conditions threatening health and the environment . . . . Therefore, it has *always reached those persons who have contributed in the past or are presently contributing to the endangerment* . . . ." *Id.* at 740. The Supreme Court also found the differences in liability under RCRA and CERCLA apparent: "[T]he stark differences between the language of that section [RCRA § 6972] and the cost recovery provisions of CERCLA . . . demonstrate that Congress did not intend for a private citizen to be able to undertake a clean up and then proceed to recover its costs under RCRA." *Meghrig*, 516 U.S. at 487.

[136] *See supra* Part III.B of this Comment.

[137] CERCLA was enacted in 1980 and in 1983 *Georgeoff* was decided. Ever since the *Georgeoff* decision the courts have applied CERCLA retroactively, giving Congress more than a decade to make modifications if retroactive application was contrary to Congress's intent.

and many PRP's held responsible under section 107(a) for events that occurred in the past, with little or no congressional action to change the retroactive liability under CERCLA.[138] Through this inaction Congress has acquiesced, providing even more evidence of a clear intent that CERCLA must be read retroactively.

The Supreme Court addressed the issue of how to interpret congressional silence in *Bob Jones University v. United States.*[139] In that case, legislation was introduced to overturn over thirteen IRS rulings over a span of twelve years, and none ever passed.[140] The Court concluded that Congress, by its failure to take corrective action, had acquiesced in the prior IRS rulings:

> Nonaction by Congress is not often a useful guide, but the nonaction here is significant. During the past 12 years there have been no fewer than 13 bills introduced to overturn the IRS interpretation of §501(c)(3). Not one of these bills has emerged from any committee, although Congress has enacted numerous other amendments to §501 . . . Congress'[s] failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in the IRS rulings of 1970 and 1971.[141]

The Court interpreted Congress's inability to change the prior rulings as its acquiescence, by its failure to modify the IRS rulings.[142] The Court found additional support for its opinion in that the prior revenue rulings were consistent with public policy by granting exemptions to charities.[143]

CERCLA can be read analogously. Although bills are periodically introduced to eliminate retroactive liability, none which would affect CERCLA have been seriously considered.[144] In 1986, Congress amended and reauthorized CERCLA via the Superfund Amendments and Reauthorization Act (SARA) of 1986.[145] CERCLA was reauthorized again in November 1990,

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[138] *See supra* notes 8–10.

[139] 461 U.S. 574 (1983).

[140] *See id.* at 600.

[141] *Id.* at 600–01.

[142] *See id.* at 599.

[143] *See id.* at 597–99.

[144] CERCLA was substantially amended by the Superfund Amendments and Reauthorization Act (SARA), and Congress has subsequently reauthorized the Superfund program on November 5, 1990 and September 30, 1991. *See* FOGLEMAN, *supra* note 5, at 21; John J. Zodrow, *On the Brink of Reform: Four Bills Vie for Superfund Reauthorization,* ENVTL. SOLUTIONS, Dec. 1, 1995, 18 (discussing S. 1285 and H.R. 2256).

[145] *See* FOGLEMAN, *supra* note 5, at 20. "By 1985, when Congress considered reauthorizing CERCLA, it realized that the problem of abandoned and uncontrolled hazardous waste sites was significantly worse than what was foreseen in

without significant amendments until September 1994.[146] Even in 1995 there were several bills introduced addressing the retroactivity issue, but none were ever passed.[147] Congress was consciously aware of and had ample opportunity to examine the retroactive scheme of CERCLA and revise it through any of CERCLA's amendments. However, Congress has been content with the imposition of response costs to pre-enactment conduct and instead has concerned itself with issues such as strengthening the powers of the EPA to respond to hazardous substance releases and giving it more flexibility to act through the SARA Amendments.[148] This long period of congressional acquiescence shows that Congress approves of applying CERCLA retroactively.[149]

1980 . . . . Therefore, one of the purposes of the [SARA] amendments was to rebuild public confidence in the Superfund program." *Id.* at 13–14.

[146] *See id.* at 5 (citing Pub. L. No. 96-510, 94 Stat. 2767 (1980); Pub. L. No. 99-499, 100 Stat. 1613 (1986); Pub. L. No. 101-508, § 6301, 104 Stat. 1388, (1990)). Lately the idea of reforming CERCLA to apply only prospectively has been considered. *See* H.R. 2500, 104th Cong. (1995):

> Sec. 201. RETROACTIVE LIABILITY DISCOUNT.
>
> (g) Reimbursement for Retroactive Liability- (1) In the case of a facility or vessel not owned by the United States listed on the National Priorities List, a person . . . shall be eligible for reimbursement from the Fund for 50 percent of the costs referred to in section 107(a) paid or incurred by such person after October 18, 1995, to the extent that—
>
> (A) such person's liability under section 107 is attributable to a status or activity of such person . . . that existed or occurred prior to January 1, 1987, and
>
> (B) such costs are attributable to response activities carried out after October 18, 1995.

Id.

[147] *See* Zodrow, *supra* note 145, at 18 (indicating that H.R. 2256, the "Superfund Liability Equity and Acceleration Act," includes a repeal of pre-1987 retroactive liability and S. 1285, the "Accelerated Cleanup and Environmental Restoration Act," includes an exemption from CERCLA liability for any company whose pollution occurred before December 11, 1980).

[148] *See* FOGLEMAN, *supra* note 5, at 14.

[149] There is a distinction between "congressional acquiescence" and the "presumption against retroactive application of statute." The presumption against retroactivity must be overcome, as shown through *Landgraf.* However, congressional acquiescence is not a presumption that must be overcome, rather it is one way of extracting congressional intent. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972) (finding that Congress's failure to act in not subjecting baseball to the same antitrust laws that the majority of other sports are subjected to is positive inaction by Congress, and proof that they acquiesced, even if it is inconsistent with the remainder of the statutory scheme).

IV. DEPARTING FROM A STRICT READING OF *LANDGRAF*

A. *Distinguishing* Landgraf—*An Easier Case*

An thorough examination of the *Landgraf* opinion shows the differences between overcoming the presumption against retroactivity under CERCLA section 107(a) and the 1991 Civil Rights Act section 102. First, the legislative history of section 102 indicated that the President had vetoed an earlier version of the Act on the ground, among others, of perceived unfairness in the bill's retroactivity provision.[150] The *Landgraf* Court took special notice that the omission of the retroactivity provision "was not congressional oversight or unawareness, but was a compromise that made the Act possible."[151] After Congress failed to override the President's veto, the 1991 compromise bill was submitted to the President without the retroactivity language and eventually passed.[152] Although not dispositive, the veto, the failed attempt to override, and the ultimate removal of the retroactivity language show that Congress was certainly aware of the retroactivity issue, and consciously decided to remove the retroactive language of section 102.[153] In contrast, CERCLA contains no such express or explicit rejection of retroactivity.[154] It was passed under a hurried atmosphere and contains no express evidence of congressional awareness such as a failed override of a presidential veto.

Secondly, the *Landgraf* Court found it significant that section 102

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[150] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 255–56 (1994).

[151] *Id.* at 256.

[152] *See id.* at 256 (citing 136 CONG. REC. S. 16,589 (1990) (66-34 Senate vote in favor of override)).

[153] *See id.* at 256. The Court recognized that the removal of retroactivity language was not dispositive in itself:

> The absence of comparable language in the 1991 Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue. Rather, it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement *not* to include the kind of explicit retroactivity command found in the 1990 bill.
>
> The omission of the elaborate retroactivity provision of the 1990 bill . . . is not dispositive because it does not tell us precisely where the compromise was struck in the 1991 Act.

Id. at 256.

[154] *See supra* note 44 and accompanying text (explaining why deletions of certain provisions in the House bill, such as retroactive liability and oil spill provisions, were insignificant).

authorizes punitive damages in certain circumstances.[155] Because retroactive application of punitive damages raises a constitutional question, the Court stated that it would have to be confronted with a statute that explicitly authorized punitive damages for pre-enactment conduct in order to rule on the issue, and the Civil Rights Act contains no such explicit command.[156] Overcoming the presumption against retroactivity is made more difficult when it would present an ex post facto problem.[157] If the Court had held that section 102 was to apply retroactively, it would have had to address this constitutional question, violating an additional axiom that statutes should be construed to avoid constitutional questions.[158] In contrast, under CERCLA section 107(a), the damages recoverable are not punitive, rather they are somewhat equitable in that they provide for restitution of clean up costs from responsible parties. Thus, what the Court in *Landgraf* found as additional evidence opposing retroactive application of section 102 is absent from CERCLA's section 107(a).

Lastly, CERCLA is distinguishable from the statute at issue in *Landgraf* because without a retroactive reading, CERCLA is rendered entirely ineffective. Section 102 of the Civil Rights Act differs from section 107(a) of CERCLA in that section 102 still operates just as effectively without a retroactive reading.[159] The Court acknowledged that retroactive application may frequently vindicate a statute's purpose more fully, but that alone is not enough to overcome the presumption against retroactive application.[160] A key difference is that the Civil Rights Act of 1991 was broad and expansive and encompassed many aspects.[161] However, CERCLA is unique in that it has a

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[155] *See Landgraf*, 511 U.S. at 281.

[156] *See id.*

[157] *See id.* at 265–68. "It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation." *Id.* at 266 (citing U.S. CONST. art. I, § 10, cl. 1).

[158] *See id.* at 267 n.21. "In some cases, however, the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application." *Id.*; *see also* NLRB v. Catholic Bishops of Chicago, 440 U.S. 490 (1979) (declining to choose a construction of an act that would require the resolution of difficult First Amendment questions).

[159] Section 102 provides for, *inter alia*, recovery for compensatory and punitive damages for sexual harassment under Title VII. Without a retroactive reading, recovery of compensatory and remedial damages for sexual harassment that occurred after section 102 was enacted is still allowed. "Section 102 is plainly not the sort of provision that *must* be understood to operate retroactively because a contrary reading would render it ineffective." *Landgraf*, 511 U.S. at 286.

[160] *See id.* at 285–86.

[161] *See id.*

more narrow focus—to clean up hazardous sites such as the popularly known Love Canal. To achieve this purpose and provide money for clean up, Congress enacted CERCLA.[162] Congress also showed that CERCLA was backward looking by enacting RCRA, which is forward looking, to continue vigilant regulation of the disposal and treatment of hazardous substances.[163] In light of the narrow purpose of CERCLA, and the fact that Congress enacted a second forward or prospective looking statute, RCRA, it is clear that the arguments supporting CERCLA's retroactive application overcome the problems the *Landgraf* Court had in finding clear evidence of congressional intent.

V. CONCLUSION

Congress did not expressly provide for CERCLA's temporal reach, therefore the presumption against retroactive application of statutes must be applied to CERCLA. To overcome this presumption, and thus apply CERCLA retroactively, the Supreme Court in *Landgraf* instructs that there must be "clear intent" by Congress to apply a statute retroactively.[164] CERCLA clearly evidences the expression of congressional intent to overcome the presumption against retroactivity. The intent of Congress is clear—polluters must pay. The entire impetus for enacting CERCLA was to clean up such sites as Love Canal and the Velsicol Chemical site.

Both prior and new rationales for supporting the retroactivity of CERCLA prove that CERCLA overcomes the presumption against retroactive application of statutes. There is ample evidence of congressional intent exhibited through the use of past tense verbs in the statute, the legislative reports and numerous debates, the overall scheme and spirit of the statute, the presence of RCRA in the enforcement scheme, and congressional acquiescence. The claim that there is insufficient congressional intent to overcome the presumption against retroactivity was advanced in *Olin*. However, this decision fails to acknowledge fully the scheme, purpose, and legislative history of CERCLA. Congress's resonating intent in enacting CERCLA was to create a statutory mechanism to exact responsibility upon those who were responsible for creating hazardous sites, such as Love Canal and the Velsicol Chemical site.

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162 *See supra* notes 128–36 and accompanying text.

163 *See id.*

164 *See supra* Part II.B.